

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

\* \* \*

UNITED STATES OF AMERICA,

Plaintiff,

v.

DEVIN THOMPSON,

Defendant.

Case No. 2:16-cr-00230-GMN-CWH

**REPORT AND RECOMMENDATION**

Presently before the court is defendant Devin Thompson's motion to suppress (ECF No. 289), filed on April 23, 2019. The government filed a response (ECF No. 305) on June 10, 2019. Thompson filed a reply (ECF No. 306) on June 17, 2019.<sup>1</sup>

**I. BACKGROUND**

Thompson and seven others have been indicted for, among other things, conspiracy to distribute controlled substances. (Indictment (ECF No. 18).) Prior to the indictment, DEA agents in Las Vegas received information that defendant Thompson was part of a conspiracy to traffic controlled substances, and an application and affidavit were submitted to obtain an order authorizing the interception of wire and electronic communication over a cellular telephone used by Thompson. The application includes an affidavit executed by Special Agent Nestor ("Affiant"). Thompson argues that the wire taps were unnecessary, and alternatively, that a *Franks* hearing is required because materially false statements were used to obtain the warrant.

**A. The Wiretap Application**

Federal wiretaps are governed by Title III of the Omnibus Crime Control and Streets Act. *See* 18 U.S.C. §§ 2510-2520; *United States v. Sandoval*, 550 F.2d 427, 429 (9th Cir. 1976). A

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<sup>1</sup> By report and recommendation, the court initially denied the motion as untimely. (Report and Recommendation (ECF No. 291).) The district court rejected the report and remanded for further proceedings. (Mins. of Proceedings (ECF No. 304).)

1 district court may authorize a wiretap upon a showing that the wiretap is supported by both  
2 probable cause and necessity. *See United States v. Garcia-Villalba*, 585 F.3d 1223, 1227 (9th  
3 Cir. 2009). To demonstrate necessity, the application must contain:

4 [A] full and complete statement of the facts and circumstances relied upon by the  
5 applicant, to justify his belief that an order should be issued including (i) details as to  
6 the particular offense that has been, is being, or is about to be committed, (ii) except  
7 as provided in subsection (11), a particular description of the nature and location of  
8 the facilities from which or the place where the communication is to be intercepted,  
9 (iii) a particular description of the type of communications sought to be intercepted,  
10 (iv) the identity of the person, if known, committing the offense and whose  
11 communications are to be intercepted;

12 § 2518(1)(b). Additionally, the affiant must include a full and complete statement that “other  
13 investigative procedures have been tried and failed” or are “unlikely to succeed.” § 2518(1)(c).  
14 The issuing judge may approve the wiretap upon a finding that “normal procedures have been  
15 tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too  
16 dangerous.” § 2518(3)(c). The affidavit must show that “normal investigative techniques  
17 employing a normal amount of resources have failed to make the case within a reasonable period  
18 of time.” *United States v. Spagnuolo*, 549 F.2d 705, 710 (9th Cir. 1977). Wiretap evidence that  
19 the government obtains in violation of Title III must be suppressed. *See* 18 U.S.C. § 2515.

20 The necessity requirement is not construed as a requirement that traditional techniques are  
21 useless, but that electronic surveillance may be needed to further the investigation. *See United*  
22 *States v. Shyrock*, 342 F.3d 948, 976 (9th Cir. 2003). In investigations of conspiracy, the  
23 government has “considerable latitude” in wiretapping suspected members of that conspiracy.  
24 *United States v. McGuire*, 307 F.3d 1192, 1198 (9th Cir. 2002). The Ninth Circuit has recognized  
25 the difficult nature in investigating conspiracies by large complex organizations and the unknown  
26 identities of its members. *See e.g., Shyrock*, 342 F.3d at 976; *see also McGuire*, 307 F.3d at 1198.  
27 Further, the Ninth Circuit has continuously approved broad investigative goals in conspiracy  
28 cases. *See United States v. Canales Gomez*, 358 F.3d 1221, 1224 (9th Cir. 2004) (where the court  
approved a wiretap order in a conspiracy investigation where the objectives were to discover “full  
scope of the massive conspiracy under investigation,” and to “obtain direct evidence that will

1 convince a jury beyond a reasonable doubt of its existence”); *see also United States v. Bennett*,  
2 219 F.3d 1117, 1121 n. 3 (9th Cir. 2000) (noting that the Ninth Circuit has “consistently upheld  
3 similar wiretap applications seeking to discover major buyers, suppliers, and conspiracy  
4 members”); *United States v. Brone*, 792 F.2d 1504, 1505-1506 (9th Cir. 1988) (where the Ninth  
5 Circuit found that the district court did not abuse its discretion in authorizing a wiretap to “enable  
6 the agents to uncover the source of [the defendant’s] narcotics or the modus operandi of the  
7 alleged conspiracy”).

8 A search warrant is valid if supported by an affidavit establishing probable cause. *See*,  
9 *e.g.*, *United States v. Stanert*, 762 F.2d 775, 778 (9th Cir. 1985). An affidavit for a wiretap  
10 warrant must establish probable cause that the phone user is involved in a § 2516(1) enumerated  
11 crime, uses the phone in connection with the crime, and that calls concerning the crime will be  
12 intercepted. §§ 2518(3)(a), (3)(b), (3)(d); *see also* § 2516(1) (providing a list of enumerated  
13 crimes, including narcotics related offenses). Probable cause is assessed by the totality of the  
14 circumstances, which is a common-sense determination whether there is a “fair probability that . .  
15 . evidence of a crime will be found in a particular place.” *See Illinois v. Gates*, 462 U.S. 213,  
16 230-34 (1983).

17 The Ninth Circuit provides a two-step approach in reviewing wiretap orders. *United*  
18 *States v. Rodriguez*, 851 F.3d 931, 937 (9th Cir. 2017). First, the district court “reviews de novo  
19 whether an application for a wiretap order is supported by a full and complete statement of the  
20 facts in compliance with 18 U.S.C. § 2518(1)(c).” *United States v. Rivera*, 527 F.3d 891, 898  
21 (9th Cir. 2008). Once the court determines that a full and complete statement was submitted, then  
22 the court reviews under an abuse of discretion standard the issuing judge’s decision that there was  
23 probable cause and necessity to issue the wiretap. *See United States v. Blackmon*, 273 F.3d 1204,  
24 1207 (9th Cir. 2001); *Brone*, 792 F.2d at 1506. “[A] district court reviewing the validity of a  
25 wiretap order must examine the application to see if it contained material misstatements or  
26 omissions regarding the necessity of the wiretap.” *United States v. Caneiro*, 861 F.2d 1171, 1176  
27 (9th Cir. 1988).

1           **B.       Analysis**

2           The court begins by conducting a review of the statements in the wiretap application and  
3 affidavit pursuant to the requirement that the affidavit must contain a full and complete statement  
4 of facts to support a necessity determination. *See* 18 U.S.C. § 2518(1)(b). Having reviewed the  
5 affidavit, the court finds that the affidavit adequately described the use of various investigative  
6 techniques, why those techniques would not achieve all of the investigation’s objectives, and why  
7 other techniques would be unlikely to succeed.

8           Thompson asserts that the wiretap order fails to demonstrate necessity. Thompson first  
9 argues that ordinary investigative techniques were successful, and therefore the application  
10 should have been denied because the extremely invasive wiretap was unnecessary. He argues that  
11 the confidential source, whose telephonic connections were monitored by law enforcement  
12 officers, was successful in leading to a controlled purchase of drugs by an undercover officer.  
13 The use of the pen register provided ample information regarding caller identification, subscriber  
14 information, and GPS data for the target phone. Surveillance at a medical office was successful  
15 in observing a likely procurement of illegal drugs, and a trash search was successful because  
16 evidence of a digital scale used for drug transactions was discovered. Thompson views as broad  
17 and conclusory the statements made by the affiant that “[a] successful prosecution would be  
18 difficult if based mainly on information obtained from CS-1;” Affiant knows Defendant “will not  
19 disclose to CS-1 the identities of other suppliers or the roles of other members of the  
20 organization;” “Surveillance to date has been unsuccessful in identifying all members of the  
21 conspiracy;” and pen registers “will not by themselves achieve the goals of the government’s  
22 investigation.”

23           The government responds that for an investigation into a drug trafficking organization to  
24 be successful, collection of merely some evidence is insufficient. The investigation must  
25 “develop an effective case against those involved in the conspiracy. *United States v. Decoud*, 456  
26 F.3d 996, 1007 (9th Cir. 2006) (citation omitted). An “effective case is one which proves guilt  
27 beyond a reasonable doubt, not merely evidence sufficient to secure an indictment.” *United*  
28 *States v. Garcia-Villalba*, 585 F. 3d 1223, 1228 (9th Cir. 2009) (citation omitted).

1 Here, the affidavit set forth broad investigative goals for this warrant, and Thompson  
2 makes no argument that they are improperly broad. The court agrees that the traditional methods  
3 of investigation as set forth in the affidavit, although effective, did not lead to evidence of guilt  
4 beyond a reasonable doubt as all the conspirators. As described in the affidavit, the use of a pen  
5 register and physical surveillance certainly provide useful information regarding the investigation,  
6 but they do not result in an “effective case” against Thompson. Nor did the use of controlled buy,  
7 confidential source information, surveillance, and trash searches lead to the identities of all other  
8 conspirators. The court finds that the affidavit adequately explained the specific limitations of  
9 investigatory methods in this case to attain the goals of the conspiracy investigation. *See*  
10 *Rodriguez*, 851 F.3d at 943 (“the mere attainment of some degree of success during law  
11 enforcement’s use of traditional investigative methods does not alone serve to extinguish the need  
12 for a wiretap”) (citing *Bennett*, 219 F.3d at 1122); *see also United States v. Cao*, 471 F.3d 1, 3  
13 (1st Cir. 2006) (“partial success of the investigation [does] not mean that there was nothing more  
14 to be done”). Ordinary investigative techniques were not so successful as to make a wiretap  
15 unnecessary.

16 Thompson also argues that the affidavit fails to provide specific circumstances why  
17 ordinary, traditional investigative methods would fail or would be too dangerous, and he criticizes  
18 the use of boilerplate language as objectionable because it lacks case specificity. The government  
19 responds that the affiant described reasons why several investigative techniques were not used.

20 First, the use of some boilerplate language along with case-specific language is not  
21 objectionable if there is sufficient necessity shown. *United States v. McPherson*, 2017 WL  
22 4478335, at \*10 (D. Nev. May 8, 2017). Here, the affidavit provides a list of investigative  
23 techniques that have been used or considered thus far in the investigation, but that will likely be  
24 ineffective or too dangerous. Affiant notes that the ability of the confidential source to infiltrate  
25 the drug trafficking organization is limited because he has no information about the involvement  
26 of other people in the drug trafficking organization, and does not have a sufficiently close  
27 relationship with Thompson to be able to obtain additional information, or reasonably expect that  
28 Thompson will share such information.

1 Affiant notes that a controlled purchase has been conducted, but there is a high risk of  
2 danger for further controlled buys because of Thompson's criminal history, locations which  
3 Thompson wishes to conduct the transactions, the known criminal history of Thompson's  
4 associates. Affiant explains the unlikelihood that a small level transaction will expose the  
5 additional supply sources and co-conspirators, and the danger of the undercover agent being  
6 injured when conducting a high-level transaction.

7 The affidavit explains that some physical surveillance has been successful, but that by its  
8 nature, physical surveillance is not useful to investigate places outside of view. Additionally, it  
9 notes that the presence of vehicles not belonging to known residents of the various neighborhoods  
10 and residences associated with this organization is conspicuous, and therefore likely to reveal the  
11 investigation. The affidavit indicates specifically that, prior to the controlled drug sale in this  
12 case, Thompson had been seen walking a pit bull through the parking lot where the transaction  
13 was about to be conducted, presumably trying to spot surveillance. Additionally, the affidavit  
14 describes how Thompson has been observed driving in a way intended to defeat law enforcement  
15 surveillance activities.

16 The affidavit indicates that search warrants have not been sought because a previous  
17 search had only yielded a small amount of drugs. It also indicates that Thompson used multiple  
18 locations to store drugs and drug trafficking information, and is reasonably believed to be  
19 compartmentalizing the organization, making a search warrant likely ineffective in achieving the  
20 goals of identifying additional members of the organization and the drug suppliers.

21 The affidavit notes that trash searches have been of limited success at one of Thompson's  
22 residences, but Thompson sometimes lives in a large apartment complex served by a communal  
23 dumpster, making it impossible to distinguish Thompson's trash.

24 The affidavit indicates that video surveillance was attempted but was unsuccessful  
25 because of the apartment was located in a cellular "dead spot." Like GPS surveillance, video  
26 surveillance is of limited usefulness in uncovering the scope of the operation, for example, what  
27 is happening within the various locations where Thompson is located.  
28

1 The affidavit indicates that financial investigation was of limited success. Information  
 2 showed that deposits into Thompson's accounts were made in various states, and the deposits  
 3 were quickly followed by withdrawals in Nevada and California, making it likely that Thompson  
 4 was shipping out of state. But the known accounts had all been closed when the affidavit was  
 5 drafted.

6 Having determined that the application meets the requirements of § 2518(1)(c), the court  
 7 employs a "common sense" approach to evaluate the reasonableness of the Government's good  
 8 faith efforts to use traditional investigative tactics or its decision to forego such tactics based on  
 9 the unlikelihood of their success or the probable risk of danger involved with their use. *United*  
 10 *States v. Gonzalez, Inc.*, 412 F.3d 1102, 1112 (9th Cir. 2005). The government appropriately  
 11 used ordinary investigative techniques, and demonstrated necessity for the use of the wiretap, and  
 12 so the issuing judge did not abuse her authority in ordering the wiretap.

### 13 **C. Franks Hearing**

14 Thompson alternatively moves for a *Franks*<sup>2</sup> hearing to determine whether the affidavit is  
 15 based upon omitted, false, or misleading statements. To obtain a *Franks* hearing, a defendant  
 16 must make "a substantial preliminary showing that a false statement was deliberately or  
 17 recklessly included in an affidavit submitted in support of a wiretap order, and the false statement  
 18 was material to the district court's finding of necessity." *United States v. Staves*, 383 F.3d 977,  
 19 982 (9th Cir. 2004); *U.S. v. Ippolito*, 774 F.2d 1482 (9th Cir. 1985) (applying *Franks* to the  
 20 showing of necessity required for a wiretap order). False statements are material "if the wiretap  
 21 application purged of the false statements would not support findings of probable cause and  
 22 necessity." *Id.* Immaterial falsehoods, even if made deliberately, are not fatal. *See Franks v.*  
 23 *Delaware*, 438 U.S. 154, 171 (1978) ("Allegations of negligence or innocent mistake are  
 24 insufficient").

25 A material omission of information in an affidavit offered in support of an application for  
 26 a wiretap may also trigger a *Franks* hearing. Where the defendant asserts an omission from the  
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28 <sup>2</sup> *Franks v. Delaware*, 438 U.S. 154 (1978).



1 affidavit, the inquiry is whether the inclusion of the information in the affidavit would have led to  
2 a negative finding by the issuing judge on necessity or probable cause. *See U.S. v. Chavez–*  
3 *Miranda*, 306 F.3d 973 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 1317 (2003); *Ippolito*, 774 F.2d at  
4 1486 n.1 (noting that the reviewing court should “insert the omitted truths” into the affidavit and  
5 determine whether necessity was shown). Thus, to prevail on a claim that the affidavit in support  
6 of the wiretap application omitted information, a defendant must show (1) that facts were omitted  
7 with the intent to make, or in reckless disregard of whether they would make, the affidavit  
8 misleading, and (2) that the affidavit, if supplemented by the omitted information, would not  
9 support a finding of necessity or probable cause.

10 Thompson argues that affiant’s account of how surveillance fails is deficient because it  
11 only contains generalized statements true of any narcotics investigation, which is that it is limited  
12 and conspicuous, making prolonged surveillance all but impossible, and that it fails to account for  
13 a successful surveillance conducted on April 11, 2016. Second, he argues that the statement that  
14 the confidential informant is merely an associate of the criminal enterprise, that he has no  
15 knowledge of the inner-working of the enterprise, or that he would not be able to obtain that  
16 information fails to provide any specific facts as to why confidential sources would fail or be too  
17 dangerous. The government responds that Thompson fails to identify any false statements, and  
18 identifies only one omission, which is not material to a finding of necessity. The government  
19 explains that the omission related to surveillance conducted on April 11, 2016 when agents  
20 followed Thompson when he drove two associates to a chiropractic clinic to procure drugs.


21 The court has reviewed the parties’ arguments and the affidavit and finds that Thompson  
22 has not identified a false statement regarding surveillance or the confidential informant. The  
23 omission which said that Thompson was surveilled on April 11, 2016, is not material because  
24 even if the statement was added to the affidavit, it would not impact the ultimate decision  
25 regarding the necessity of the wiretap order. Thompson makes no argument as to how the  
26 statement would make a difference. Accordingly, because no false statements or material  
27 omissions are identified, a *Franks* hearing is unnecessary.  
28



IT IS THEREFORE RECOMMENDED that Thompson's motion to suppress (ECF No. 11) be DENIED.

This report and recommendation is submitted to the United States district judge assigned to this case under 28 U.S.C. § 636(b)(1). A party who objects to this report and recommendation may file a written objection supported by points and authorities within fourteen days of being served with this report and recommendation. Local Rule IB 3-2(a). Failure to file a timely objection may waive the right to appeal the district court's order. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991).

DATED: June 25, 2019

  
C.W. HOFFMAN, JR.  
UNITED STATES MAGISTRATE JUDGE